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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1211

Claude S. Carter, Jr. and
Thomas C. Burkhead ..... *Petitioners*

V.

State of Arkansas ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The Opinion of the Arkansas Supreme Court is reported at 255 Ark. 225, 500 S.W.2d 368 and is reproduced as an appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether Ark. Stat. Ann. §41-813, for the violation of which Petitioners were convicted, is unconstitutionally vague.

2. Whether the arrest and conviction of Petitioners for sodomy violated their constitutional rights to privacy.

3. Whether the sentence imposed by the jury constituted "cruel and unusual punishment in violation of the Fourteenth Amendment."

STATEMENT OF THE CASE

Petitioners were arrested by two sheriff's deputies at 11:00 p.m. on the night of September 27, 1972 at a State camping ground or "rest area" adjacent to Interstate 30 in Miller County, Arkansas.

Petitioners were charged with a violation of Ark. Stat. Ann. §41-813 and were convicted on the evidence given by the two officers who testified that Carter and Burkhead had been observed in the act of fellatio. Petitioner Carter was 28 years old at the time of trial and Petitioner Burkhead was 51. The jury assessed punishment at eight (8) years imprisonment.

The questions raised in the Petition were considered by the Supreme Court of Arkansas which rejected Petitioner's arguments on their merits and affirmed both convictions and sentences on October 8, 1973.

ARGUMENT

I.

Ark. Stat. Ann. §41-813 is not unconstitutionally vague.

Ark. Stat. Ann. §41-813 reads as follows:

> "Every person convicted of sodomy, or buggery shall be imprisoned in the penitentiary for a period not less than one (1) nor more than twenty-one (21) years."

The commonly accepted meaning and usage of the word "sodomy" is reflected in *Webster's Third New International Dictionary*, copyright 1966, at page 2165:

> "Sodomy - the homosexual proclivities of the men of the city as narrated in Gen. 19: 1-11: carnal copulation with a member of the same sex or with an animal or unnatural carnal copulation with a member of the opposite sex; *specif.:* the penetration of the male organ into the mouth or anus of another - compare bestiality, buggery, cunnilingus, fellatio, homosexuality, pederasty."

The State submits that the statute in question is drafted in words of sufficient clarity to advise a person of average intelligence of the acts prohibited. Ark. Stat. Ann. §41-814 provides:

> "Proof of actual penetration into the body shall be sufficient to sustain an indictment for the crime against nature."

The Arkansas Supreme Court has consistently interpreted the statute to proscribe oral-genital contact

whether cunnilingus, *Smith v. State*, 150 Ark. 265, 234 S.W. 32, or fellatio, *Strum v. State*, 168 Ark. 1012, 272 S.W. 359; *Connor v. State*, 253 Ark. 854, 490 S.W.2d 114, appeal dismissed for want of a substantial federal question, 42 U.S.L. Week 3269 (U.S. November 5, 1973) (No. 72-1612).

It is hereby submitted that the statute in question is not unconstitutionally vague and that judicial interpretation of the statute has made it absolutely clear that fellatio is indeed proscribed. At any rate, no substantial federal question is raised.

II.

Petitioners constitutional rights to privacy were not violated.

Petitioners argue that the act for which they were arrested occurred in private and "hurt no one, with the possible exception of themselves." The facts of the case, as reviewed by the Arkansas Supreme Court, are otherwise. The Court noted that the public rest area in which the automobile was parked was well lighted, that use of a flashlight was unnecessary to observe the actions of the people within the automobile, that the area was crowded and other cars were parked nearby, and that the site was frequented by children. Further, the officers testified that visitors to the rest area had recently complained about homosexual advances and of the public performance of homosexual acts. The Court found "[N]o greater degree of privacy than that shown in *Connor* . . . " (supra).

Clearly the offense occurred in public. Whatever the boundaries of the constitutional right to privacy, this

Court has never suggested that they be expanded to protect the public performance of homosexual acts. The question of the State's interest in prohibiting homosexual activity between consenting adults *in private* is not brought before the Court by the present case.

Petitioners cite *Norton v. Macy*, 417 F. 2d 1161 (D.C. Cir. 1969) as dealing with "[S]imilar conduct in an automobile on a public street . . . " The *Norton* case involved the dismissal of a federal employee from his position as a budget analyst for NASA on the basis of an allegation by one Proctor that the appellant had made a homosexual advance (" . . . Proctor told police that appellant had felt his leg . . . ") in an automobile. The State would submit that the "conduct" in *Norton, supra*, was not "similar" to that of Petitioners, that the issues in *Norton* were entirely different from those involved in a criminal prosecution as in the instant case, and that *Norton* is not applicable to the case at bar.

In short, no substantial federal question has been raised.

III.

The sentence imposed was not excessive.

The eight (8) year sentence imposed by the jury was within the range set by the statute (one to twenty-one years) and considerably less than the maximum. As noted by the Arkansas Supreme Court: "It is within the province of the legislative branch to classify crimes and determine the punishment thereof."

The fact that the jury had a "broad latitude" in assessing punishment in no way indicates that their decision was "arbitrary."

Petitioners ask this Court to notice that: "The Arkansas State Penitentiary . . . is not just any penitentiary." It is suggested that the possibility of homosexual assault is greater in the Arkansas State Penitentiary than in the correctional institutions of other states (although it is conceded that "It is true that conditions have improved somewhat . . . ") and that imprisonment therein is cruel and unusual punishment in and of itself.

It is a well-known and most unfortunate fact that homosexual assaults occasionally occur in most penal institutions. The State would take issue with Petitioners' unsupported suggestion that the likelihood of such an attack is greater in the Arkansas Penitentiary system than elsewhere. At any rate, no federal question is raised by such an allegation, especially when unsupported by a factual basis.

CONCLUSION

On the basis of the foregoing, Respondent submits that the decision of the Arkansas Supreme Court does not conflict with any federal case or statute or with the United States Constitution. No federal question having been raised, no basis is presented for the granting of certiorari. It is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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